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No. 94-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

REV. WILLIAM LAWSON ET AL., APPELLANTS,

and

ROBERT REYES, ET AL., APPELLANTS

v.

AL VERA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

I. Where a State knows that it is possible to construct a reasonably compact minority opportunity district, within the meaning of *Thornburg v. Gingles*, and recognizes its obligation to avoid vote dilution, does *Shaw v. Reno* require the State to abandon all other districting goals and maximize regularity of shape of the voting rights district?

II. Where a State's majority-white congressional districts are highly irregular in shape, does *Shaw v. Reno* require the State to maximize regularity of shape only for its minority opportunity districts?

III. Are small, functional, rational, single-urban-area minority opportunity districts, that unite persons with a commonality of interest, unconstitutional under *Shaw v. Reno*?

IV. Did plaintiffs prove the elements of an Equal Protection claim with respect to Texas congressional District 18, 29 or 30?

V. Does *Shaw v. Reno* confer automatic standing on any State resident who idealizes colorblind districting?

PARTIES TO THE PROCEEDING

Plaintiffs are Al Vera, Edward Blum, Edward Chen, Pauline Orcutt, Barbara L. Thomas and Kenneth Powers.

Defendants are Texas State officials, Ann Richards, Governor, Bob Bullock, Lieutenant Governor, Pete Laney, Speaker of the House of Representatives, Dan Morales, Attorney General, and Ron Kirk, Secretary of State.

The Lawson Defendant-Intervenors are Rev. William Lawson, Zollie Scales, Jr., Rev. Jew Don Boney, Deloyd T. Parker, Dewan Perry, Rev. Caesar Clark, David Jones, Fred Hofheinz and Judy Zimmerman.

The LULAC Defendant-Intervenors are Robert Reyes, Angie Garcia, Robert Anguiano, Sr., Dalia Robles, Nicolas Dominguez, Oscar T. Garcia, Ramiro Gamboa and League of United Latin American Citizens (LULAC) of Texas.

The United States intervened as a defendant.

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JURISDICTIONAL STATEMENT

Appellants, Rev. William Lawson, Zollie Scales, Jr., Rev. Jew Don Boney, Deloyd T. Parker, Dewan Perry, Rev. Caesar Clark, David Jones, Fred Hofheinz and Judy Zimmerman (Lawson Intervenors) and appellants Robert Reyes, Angie Garcia, Robert Anguiano, Sr., Dalia Robles, Nicolas Dominguez, Oscar T. Garcia, Ramiro Gamboa and League of United Latin American Citizens (LULAC) of Texas (LULAC Intervenors), appeal from the injunction of

Texas' congressional districting plan entered by the United States District Court for the Southern District of Texas.

OPINION BELOW

The unreported opinion of the three-judge district court finding three districts unconstitutional, entered on August 17, 1994, is set out in the Appendix to the Jurisdictional Statement of the State Appellants (State App.) at 5a-84a.

JURISDICTION

On September 2, 1994, the district court entered an order requiring the State Legislature to develop a remedy plan by March 15, 1995. State App. 1a. On September 14, 1994, the court amended its September 2 order *nunc pro tunc*, to enjoin use of Texas' congressional districting plan for 1996 elections. *Id* at 30. The Lawson Intervenors and the LULAC Intervenors filed Notices of Appeal on October 3 and September 30, respectively. App. 1a, 4a. The Court has jurisdiction under 28 U.S.C. § 1253.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Equal Protection Clause of the Fourteenth Amendment provides that "[N]o State . . . shall deny to any person within its jurisdiction the equal protection of the laws." Sections 2 and 5 of the Voting Rights Act of 1965, 42 U.S.C. §§ 1973, 1973c, are set out in State App. 87a-88a.

STATEMENT

Proceedings Below

Plaintiffs filed suit on January 26, 1994, challenging under the Fourteenth Amendment at least 24 of Texas' 30 congressional districts. *See* State App. 9a & n.3. Plaintiffs claimed that Texas illegally used race in constructing congressional districts and failed to follow certain allegedly "traditional" districting principles. State App. 10a. The court granted motions of Rev. William Lawson, *et al.*, nine black and white voters in Districts 18 and 30 (Lawson Intervenors), the League of United Latin American Citizens (LULAC) of Texas and seven Hispanic voters (LULAC Intervenors) and the United States, to intervene as defendants. *Id.* at 11a.

The court below invalidated three districts, including Texas' only two African American opportunity districts (18 and 30) and one district (29) intended to provide Hispanic political opportunity. The court upheld the constitutionality of the other 21 challenged districts, of which 18 are majority white and 3 are majority Hispanic.

Incumbency Protection

More than a year prior to redistricting, the Texas congressional delegation began work with the "overriding objective" of "incumbency protection." State App. 23a. The court below noted: "The incumbents 'have practically drawn their own districts. Not practically, they have.'" *Id.* at 24a (quoting Senator Johnson, Chair, Subcommittee on Congressional Districts). The district court found: "[N]ever before have districts been drawn on a block-by-block or neighborhood- or town-splitting level to corral voters perceived as sympathetic to incumbents or to exclude opponents of incumbents." *Id.* at 55a. The court graphically described the result:

> [M]any incumbent protection boundaries sabotaged traditional redistricting principles as they routinely divided counties, cities, neighborhoods, and regions. . . . Congressmen or would-be Congressmen shed hostile groups and potential opponents by fencing them out of their districts. ... The Legislature obligingly carved out districts of apparent supporters of incumbents, as suggested by the incumbents, and then added appendages to connect their residences to those districts.

Id. at 55a-56a (footnotes and citations omitted).[1]

As found by the district court, many Texas congressional districts were "disfigured less to favor or disadvantage one race or ethnic group than to promote the reelection of incumbents." State App. 9a (footnote omitted). Pictured on the following page are two examples of irregularly shaped, majority-white districts. District 6 rambles over 5 counties, PX 34P, includes urban, suburban and rural territory, and makes a jagged incursion into Ellis County to pick up the residence of incumbent Joe Barton. Its longest axis is 82 miles, almost twice that of Districts 18, 29 and 30. U.S. Ex. 1067. District 6 interweaves with

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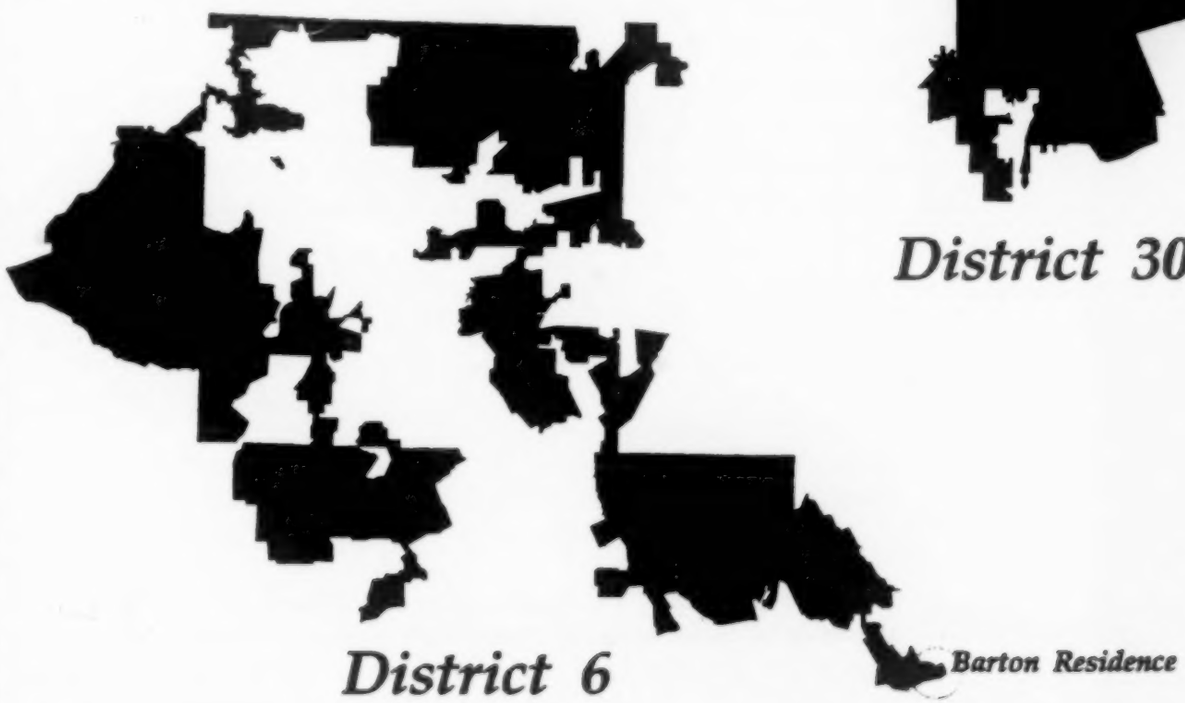
[1]Drawing districts to promote election of incumbents and aspiring State Legislators is a strong Texas tradition. *See, e.g., White v. Weiser*, 412 U.S. 783, 792 (1973) (describing incumbency protection in 1970's). Regular shapes and respect for political subdivisions have a weak history, at best, as districting goals. *See* State App. 15a, n.9. Although the court below thought that prior plans were more compact than the 1991 plan, there is no evidence of a previous legislative *goal* of compact districts, as opposed to lack of the technological capacity available in 1991. Many legislators stated without contradiction that compactness has never been a strong State interest in congressional districting. *E.g.* Lawson Ex. 14 ¶ 17 (State Senator Ted Lyon); State Ex. 23 (Justice (former State Senator) Oscar Mauzy).

47 Percent African American
Democrat Eddie Bernice Johnson

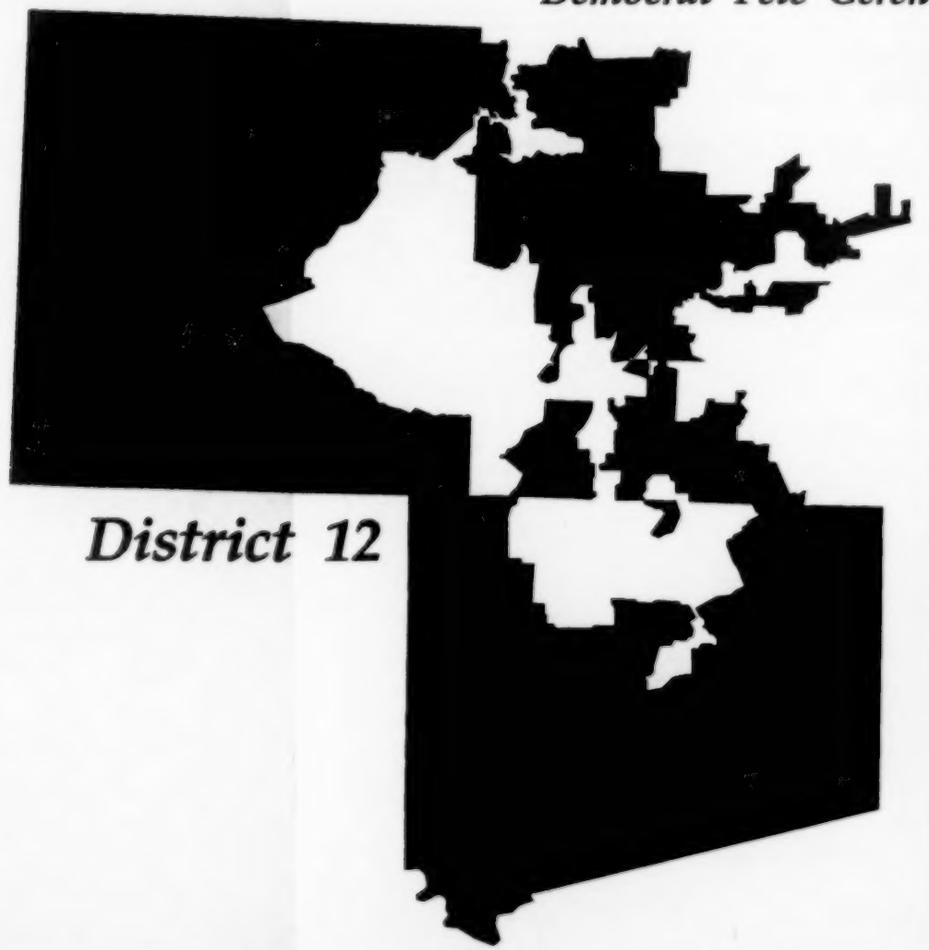
District 30

89 Percent White
Republican Joe Barton



District 6

87 Percent White
Democrat Pete Geren



District 12

COMPARISON OF SELECTED TEXAS CONGRESSIONAL DISTRICTS
(NOT DRAWN TO SCALE) PLAN ID: PUBLC657

DAN MORALES
ATTORNEY GENERAL

District 12, at one point using a narrow corridor to pass into territory almost totally surrounded by District 12. District 12 includes parts of three counties, PX 34P, and is 84 miles long, U.S. Ex. 1067. For comparison, the invalidated District 30 is also set out.[2]

Voting Rights Act Considerations

The Legislature was aware as it redistricted that the African American population in both Harris County (Houston), where District 18 had been represented by an African American since Barbara Jordan, and in Dallas County, was "sufficiently large and geographically compact"[3] to constitute an effective majority in a single-member district.[4] In Harris County, the Hispanic population had experienced phenomenal growth and numbered enough to constitute the majority in *two* congressional districts. A highly-publicized plan creating a new majority-Hispanic district in Harris County, while preserving District 18 as an African American opportunity district, was proposed by State Representative Roman Martinez on March 23, 1991.[5]

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[2]The pictures are not to scale, thus obscuring the larger size of Districts 6 and 12.

[3]*Thornburg v. Gingles*, 478 U.S. 30, 50 (1986). *See also Johnson v. De Grandy*, 129 L.Ed.2d. 775, 788-790 (1994); *Voinovich v. Quilter*, 113 S.Ct. 1149 (1993); *Growe v. Emison*, 113 S.Ct. 1075 (1993).

[4]Plaintiffs' only expert witness testified that "reasonably compact," effective African American opportunity districts could be drawn in the Dallas and Houston areas. TR III:113-115. *See also* State App. 70a-71a; State Exs. 12A, 12B, 12C.

[5]LULAC Ex. 6; Martinez Dep. I:27, 52. Virtually all of the witness statements and documentary evidence introduced by the State and the Intervenors was uncontested by plaintiffs and accepted as accurate by the court below. *But see* State App. 47a, n.36.

The Legislature was well aware of numerous court decisions finding high levels of racially polarized voting across the State.[6] The Legislature also knew that section 5 of the Voting Rights Act prohibited retrogression of District 18.

In the Dallas area, the Legislature knew that the large, geographically compact and politically cohesive African American community had been fragmented between the districts of two white incumbents in the districting plan used in the 1980's.[7] Also before the Legislature was the federal District Court's decision in *Williams v. City of Dallas*, 734 F. Supp. 1317, 1393 (N.D. Tex. 1990), issued on March 28, 1990, just as the redistricting process began. *Williams* concluded: "[I]t is clear that there is white bloc voting in Dallas which usually defeats the preferred choice of African-Americans."[8] *Williams* also found extensive evidence of virtually all of the other factors listed in the Senate Report as relevant to the "totality of the circumstances" analysis under Section 2,[9] including common use of racial appeals in

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[6]*E.g.*, U.S. Ex. 1065; State Ex. 17 at 7-24; State Ex. 15, at 6, 7. The Legislature's knowledge that voting is highly racially polarized was scientifically confirmed by experts at trial. State App. 22a-23a.

[7]*E.g.* Lawson Ex. 15 ¶ 10.

[8]For example, in 1983, African American community leaders chose a highly qualified candidate who still could not raise money from whites. *Id.* at 1361. The African American candidate was soundly defeated by the white candidate in a runoff, obtaining almost all of the black vote but only 11 percent of the white vote. *Id.* at 1324.

[9]S. Rep. No. 97-417 (1982), at 28-29. The egregious history of racial discrimination in Dallas politics is set out in the Senate Report. *Id.* at 21-22.

campaigns,[10] lack of success of minority candidates, a history of discrimination, socioeconomic disadvantages affecting political participation[11] and an atmosphere of racial polarization.[12] In 1988, just three years before the new congressional districts were drawn, the "city split across racial lines," *id.* at 1364.

Construction of the Invalidated Districts

Fortunately for Voting Rights Act compliance, Texas in 1991 received three new districts in which there was no incumbent. Based on extensive factual evidence, merely summarized above, the Legislature decided to maintain District 18 as an African American opportunity district, to place a new Hispanic opportunity district in Harris County (29), and to place another new district (30) in the Dallas metroplex as an African American opportunity district.

Protecting incumbents while inserting new voting rights districts into the incumbents' territory was not easy. In Dallas, Senator Johnson proposed a much more compact African American opportunity district, which "drew much

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[10]"[I]n the 1986 general election, John Vance -- the successful candidate for Dallas County District Attorney -- ran a newspaper ad with his picture next to the picture of his black opponent." 734 F. Supp. at 1363. *See also id.* at 1348 (Mayor ran on anti-busing platform, using racially derogatory campaign materials), 1360 (newspaper identified white candidate as "civil leader" and opponent as "black activist").

[11]734 F. Supp. at 1382, 1403.

[12]For example, statements were made in 1981-1982 City Council meetings that Oak Cliff "had to have a white representative on the Council because 'Anglos felt extremely uncomfortable being represented by blacks'" and if Oak Cliff "did not have an Anglo member on the City Council, there would be 'white flight' and 'Oak Cliff would be black within two years.'" 734 F. Supp. at 1323.

opposition from incumbents and was quickly abandoned." State App. 31a. *See also id.* at 49a. Two powerful, white, Democrat incumbents in Dallas (Martin Frost in District 24 and John Bryant in District 5) had established ties to territory and voters, including African Americans who in the 1980's had been fragmented between their districts. A carefully-crafted compromise was forged in which Frost's and Bryant's districts were each pulled back and the new district was squeezed in between them.[13]

Because Frost and Bryant retained territory that would have been in the most regularly shaped version of District 30, the District was not configured to maximize regularity of shape. To replace population taken by incumbents, then-State Senator Eddie Bernice Johnson, who intended to seek election from District 30, wanted to include *voters of all races* from her political base, the City of Grand Prairie. Congressman Frost, who also had a base in Grand Prairie, engaged in a vicious battle with Johnson over that City, which they ultimately split in a compromise. State App. 32a. Significantly, this battle was over *white*, and not African American, voters. The portion of Grand Prairie included in District 30 is only 14% African American. PX 34T.

One of the most irregular parts of District 30, to the northwest, does not pick up population, but goes out to DFW Airport, State App. 27a, which was included in the District for non-racial reasons. U.S. Exs. 1070, at 4-5, 1074, 1075. The main northern portion of District 30 would not exist if incumbents Frost and Bryant had not taken population out of District 30 on the other sides. In pushing

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[13]State App. 32a, n.23 ("Frost and Bryant split Dallas County and we were forcing another district right down in-between the two of them and pushing them outward.")(quoting staff member of Senate Subcommittee on Legislative Redistricting).

north, District 30 ran into Park Cities, a highly Republican community, whose Republican incumbent had strongly requested to keep this area.[14] Complying with this incumbent desire caused a huge incursion by District 3 into the middle of District 30. Another major goal was to comply with the request of Jewish voters to be in District 30. Lawson Ex. 22. Significant industry, located on the Central Expressway corridor in the north, was important to give political clout to the district. A final goal was to include two small African American communities, one in Hamilton Park and the other in Plano, each of which desired to be in District 30. E.B. Johnson Dep. 133-138.

Many factors influenced the boundaries of the districts in the Houston/Harris County area. As found by the district court, Congressman Mike Andrews' District 25 "was to be kept intact and Democratic." State App. at 38a. "[A] suggestion by Congressman Craig Washington that District 18 be reconfigured based on the shape of African-American majority Senate District 13 was unacceptable 'because it would have taken a large chunk out of District 25.'" *Id.* at 38a.

State Representative Roman Martinez proposed a plan in which the new Hispanic district would overlap substantially with his House District.[15] State App. 36a-37a. Significantly, Rep. Martinez' plan did not split any precincts, State App. 39a, and has never been characterized as non-

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[14]E. B. Johnson Dep. 130.

[15]All agreed that African American and Hispanic voters are not cohesive and therefore that each minority group had to be treated separately for purposes of Voting Rights Act compliance. *See* State App. 21a-22a.

compact or unduly irregular.[16] The more regularly shaped version of District 29 proposed by Rep. Martinez was rejected because then-State Senator Gene Green, who is white, wanted District 29 to overlap as much as possible with his Senate District. The court below found that "the borders of district 29 became increasingly distended as [Rep. Martinez] and Senator Green fought to place their state constituents within the new district." State App. 66a. *See also id.* at 38a-39a.

Description of the Invalidated Districts

Districts 18, 29 and 30 are racially integrated. The only plaintiff from the Dallas area, Pauline Orcutt, testified forcefully about District 30: "*It is integrated. Of course it is, and you know it.*" Orcutt Dep. 110-111 (emphasis added).[17] Dallas businessman Albert Black stated: "I grew up in a segregated neighborhood . . . . I do not understand how anyone could think a district that brings together an African-American businessman from South Dallas (like me) and an Anglo businessman from North Dallas (like Jerry Johnson) to further economic development in the entire Dallas area could be considered segregative." Lawson Ex. 1 at 16.[18]

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[16]Rep. Martinez' plan also preserved the Democratic nature of District 25, thus protecting white incumbent Mike Andrews. State App. 38a.

[17]Districts 18 and 29 also are integrated, according to plaintiffs. TR I:25 (Ed Blum); Thomas Dep. 71-72.

[18]*See also* Lawson Ex. 5 ¶¶ 2-3 (Councilwoman Sandra Crenshaw) ("I think it is ridiculous to say that this District segregates voters. . . . [D]istrict lines are invisible things in the world. . . . Dallas is extremely segregated. My neighborhood is 100 percent African American. . . . The segregation of people . . . in Dallas was present before the current congressional district lines . . . were drawn. Redlining, lack of fair housing, lack of economic development, (continued...)

Houston. District 18 was constructed in 1971[19] with the expectation, realized shortly thereafter, that then-State Senator Barbara Jordan would become its congressional representative. U.S. Ex. 1071, at 10.[20] "[F]undamentally, the 18th district has not changed much over the last 20 years." Lawson Ex. 16 ¶ 7. In voting age population (VAP), it is 49% African American. District 29, 55% Hispanic VAP, is the poorest district in the State, in which "there is definitely a community of interest." Martinez Dep. I:73. Districts 18 and 29 are located entirely within a single county. No point in District 18 is further than 39 miles from any other point, while District 29's longest axis is only 43 miles. U.S. Ex. 1067. Both districts provide for ease of transportation and communication among their residents. *Id.*[21]

Dr. Paul Geisel, an expert demographer, analyzed Districts 18 and 29 as follows:

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[18](...continued)
exclusion from the political process, and other forms of discrimination cause segregation -- not lines on a map.").

[19]District 18's traditions extend not just to African Americans, but to the long-included, majority-Anglo areas that are an integral part of the District, such as the Montrose neighborhood in downtown Houston. *E.g.* Lawson Ex. 15 ¶ 19. Voters of all races in District 18 are satisfied with its composition. *E.g.*, Lawson Ex. 10 ¶ 10 (white resident).

[20]Race was considered in the creation of District 18 in 1971, yet the district was never challenged and plaintiff Chen believed it was constitutional then. TR I:33.

[21]The perimeters of Districts 18 and 29 are only 540 and 539 miles respectively, roughly in the middle of Texas congressional districts. U.S. Ex. 1067. Eleven Texas congressional districts have boundaries of more than 900 miles, with District 23 measuring 2035 miles in total perimeter. *Id.* The State average is 750 miles. *Id.*

> Both of these districts are essentially in the city of Houston and represent historic political wards of the city. . . . In total physical size districts 18 and 29 are small as congressional districts. It is possible to visit all parts of either district in any direction in less than 1 hour. The media and other communication accesses to these districts is similar.

State Ex. 18, Pt. 3 at 8. Dr. Richard Murray, a well-respected,[22] local political scientist, reported about Districts 18 and 29: "Stable neighborhoods and communities of interest were generally respected. . . . Stable innercity neighborhoods -- River Oaks, south Montrose, the East End, Third Ward, Acres Home -- were not divided." Lawson Ex. 26, at 17.[23] Controlling for race within Districts 18 and 29, Dr. Murray found: "The congressional district plan adopted by the Texas Legislature created districts in Harris County [that] bring together people, including minorities not well represented in the legislative chambers even in the 1990's, who share a number of demographic and political behavioral characteristics." *Id.* at 25. Dr. Murray concluded that "the arguments for maximizing compactness" are "weak" in Harris County. *Id.* at 26.

Dallas. District 30 also is located in a single metropolitan area, with no point more than 42 miles from any other point, U.S. Ex. 1067.[24] The residents of District

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[22]Plaintiffs' only expert witness, testified: "I know Professor Murray very well, and I respect him." TR V:75.

[23]*See also* Lawson Ex. 15 ¶¶ 11-12; Lawson Ex. 18 ¶ 8.

[24]District 30's perimeter is 433 miles. U.S. Ex. 1067.

30 all live and work[25] within a short distance of each other, and the district rationally ties together persons with a community of interest. Demographer Paul Geisel described District 30 as follows: "Urban congressional districts, because of the population densities, can physically appear rather odd. . . . The truth . . . is that District 30 is quite compact. It represents a constituency that has a genuine focus not only for black citizens but for the region as a whole." State Ex. 18, Pt. 2 at 7-8.[26] *See also* TR IV:136-161.

The residents of District 30 share a common public transportation system (DART). The Senate Redistricting Committee used voting patterns on DART referenda in constructing District 30, including persons of all races who had voted in supported of DART and thus demonstrated a community of interest with each other. State App. 34a; E. B. Johnson Dep. 85-86. DART's system map bears an undeniable correspondence to the map of District 30.[27]

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[25]Even members of District 30 who live the farthest from the District's core travel to the downtown area to work, to go to church and to socialize. Johnson Dep. 134.

[26]The court below found that Dr. Geisel's Report, as well as that of Dr. Waddell, "accurately describe[s] the district." State App. 35a.

[27]*See* Lawson Ex. 17. The DART light rail system does not go into the affluent Park Cities area excluded from District 30. DART board member and former House member, Jesse Oliver, stated: "[T]he Dart light rail system appears to be the skeleton of District 30." Lawson Ex. 17 ¶ 10. "Without a doubt, the drawing of District 30 brought together, into one district, the voters most affected by DART's light rail project." *Id.* at ¶ 13. "The light rail starter system was designed to serve transit-dependent people; and those people are usually low to moderate income workers, who most often are minorities. District 30 includes this same community of people." *Id.* at ¶ 11.

Opinion Below

The court below invalidated districts 18, 29 and 30, while specifically upholding the constitutionality of 18 majority-white and 3 majority-Hispanic districts. The court subjected districts 18, 29 and 30 to strict scrutiny because of two factors: 1) the State admittedly took race into account in an effort to comply with the Voting Rights Act; and 2) the districts did not comply with the court's definition of "traditional" districting criteria. State App. 69a. Exalting the benefits of "geography and effective representative government," the judges opined that *their* definition of tradition (regular shapes and respect for political subdivisions) would promote the "bedrock principle of self-government," State App. 56a, 57a n.43. The judges sharply criticized the State for adopting a different vision of democratic self-government -- one which protected incumbents of both parties because of the benefits their seniority and experience conferred on the whole State. "[I]ncumbent gerrymandering" offended the court's civic "ideals," and moved it to accuse the Legislature of a "pernicious tendency" toward "undermin[ing]" "the interdependency of representatives and their constituents." *Id.* at 56a-57a & n.43.

Concluding that "[t]his form of incumbent protection is much different in degree from the generalized, and legitimate, goal of incumbent and seniority protection previously recognized by the Supreme Court," *id.* at 551,[28] the district court rejected incumbency protection as an explanation for the shapes of Districts 18, 29 and 30. The court reasoned that "*Shaw* nowhere refers to incumbent protection as a traditional districting criterion," State App.

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[28]*See* State App. 55a (distinguishing *White v. Weiser*, 412 U.S. 783, 791 (1973), and *Gaffney v. Cummings* 412 U.S. 735, 753 n.18 (1973)).

at 56a,[29] and found that "racial gerrymandering was an essential part of incumbency protection," State App. 65a, because minorities were intentionally placed in the districts of white Democrats. The court did not find the white Democrats' districts unconstitutional, however. The result of the ruling below is that the race-conscious construction of an irregularly shaped district is permissible to help white incumbents, but if that construction of the majority-white district causes a neighboring minority opportunity district to have an irregular shape, the minority district is unconstitutional.

Applying strict scrutiny, the court did not deny that the State had a compelling justification for creating minority opportunity districts in the areas of the State where Districts 18, 29 and 30 lie.[30] Rather, the court's problem was with the particular configuration chosen by the Legislature for these districts. The court ruled that narrow tailoring requires "the least possible amount of irregularity in shape." *Id.* at 72a. Since the State had gone to great effort to prove that it rejected regularly shaped versions of these districts in order to achieve other State goals, the court easily concluded that the districts did not meet its definition of narrowly tailored. *Id.* at 73a.[31]

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[29]In contrast, *Johnson v. Miller*, No. 194-008 (S.D. Ga. Sept. 12, 1994), holds that a "nonexclusive list" of "traditional districting principles" includes "protecting incumbents." Slip op. at 30.

[30]The court found it unnecessary to explore the compelling interest issue, finding narrow tailoring dispositive.

[31]There is no suggestion that these districts did not meet the other elements of narrow tailoring. They are not packed with minority voters and Texas did not create more voting rights districts than necessary. *See Johnson v. Miller*, slip op. at 67.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The Court should note probable jurisdiction to resolve several important questions concerning the meaning of *Shaw v. Reno*, 125 L.Ed. 2d 511 (1993). Full briefing and argument on this case is important because it involves facts and issues not presented in other pending appeals.

An important element of the claim under *Shaw v. Reno* is a district "so bizarre on its face that it is 'unexplainable on grounds other than race.'" 125 L.Ed.2d at 527. This case presents the question whether minority opportunity districts shaped consistently with many majority-white districts in the same State plan are actionable at all under *Shaw*. Because the minority opportunity districts invalidated by the court below are not "bizarre" or "unusually shaped" in comparison to other Texas districts, the court below should not have reached strict scrutiny. And, imposing higher shape requirements only on minority opportunity districts discriminates against minority voters and minority incumbents.

This case also raises the unique question whether, where the ability to draw reasonably compact minority opportunity districts is conceded, *Shaw v. Reno* overrides federalism and deprives the State of the ability to pursue its own districting goals simultaneously with Voting Rights Act compliance. Unlike all other post-*Shaw v. Reno* appeals, this case does not concern whether there will be three minority opportunity districts in the areas of the State now served by Districts 18, 29 and 30; all parties agree that such districts are necessary and the lower court did not indicate otherwise. The issue presented here concerns the surrounding, majority-white districts. If the minority opportunity districts are required to be pretty, the majority-white, neighboring districts will either sacrifice incumbents or become more ugly than they already are, to pull together enough like-minded voters to save the incumbents. The court below required the

State's minority opportunity districts to conform to districting principles not constitutionally required for majority-white districts and not valued by Texas. The Court has generally rejected, as infringing on the States' political function, arguments for constitutionalizing certain federally-idealized districting principles, and there is no immediately apparent logic for applying a different rule *only* to minority opportunity districts.

This case is particularly appropriate for review by this Court. In this case, small, functional, rational, single-urban-area districts have been invalidated. The court below extended *Shaw* to prohibit joining in one district persons who live *in the same city*. The lower courts are divided on whether shape or functionality governs the analysis of voting districts.

This case also presents a clear, undisputed record of plaintiffs' failure to prove any of the substantive elements of a *Shaw* claim. Finally, the case raises the unresolved question whether plaintiffs whose only harm is to their idealized vision of a "colorblind" districting process have standing to challenge a state's districting plan.

I. THE COURT BELOW ERRED IN HOLDING THAT MINORITY OPPORTUNITY DISTRICTS MUST MAXIMIZE "REGULARITY" OF SHAPE, IGNORING ALL OTHER STATE DISTRICTING GOALS

Had the State not drawn districts to give recognition to the voting strength of the large and geographically compact African American and Hispanic populations in Houston and Dallas, plaintiffs suing under section 2 of the Voting Rights Act would have been able to present conclusive proof of hypothetical liability districts that meet the *Gingles* compactness threshold. Thus, this case squarely

presents the unique[32] question whether a State which knows compactness exists and recognizes its obligation not to dilute minority voting strength must abandon all other districting goals in order to maximize regularity of shape of the voting rights districts.

The court below mandated that all minority opportunity districts "have *the least possible* amount of irregularity in shape, making allowances for traditional districting criteria."[33] State App. 72a. Thus, race must be the *exclusive* determinant of the district. This holding conflicts directly with *Johnson v. Miller*, which ruled that where race is only one of several influences, the district is not subject to strict scrutiny. Slip op. at 37, 40-41. The decision below converts *Shaw v. Reno* from a claim concerning districts shaped by race, to a constitutional prohibition on *non-racial* influences on the shape of minority opportunity districts.[34]

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[32]This question is not presented in any pending appeal. In addressing Louisiana District 4 and Georgia District 11, federal courts ruled that the African American population was so dispersed that it was *impossible* to draw a district with an effective African American majority that would meet the *Gingles* compactness threshold. *Hays v. Louisiana*, No. 92-1522 (W.D. La. July 29, 1994), slip op. at 5 n.4; *Johnson v. Miller*, slip op. at 85. Whatever the merits of those courts' definitions of compactness, which are being challenged on appeal, neither case presents the question whether the state is free to reject the most compact version of a remedial district in favor of an irregularly shaped version that better serves other state goals.

[33]The court defined "traditional" criteria narrowly as a matter of law, without regard for the State's actual traditions. State App. 56a.

[34]The lower court rejected incumbency protection as a non-racial explanation for the shapes of minority opportunity districts because *Shaw* does not explicitly mention incumbency protection and because protecting white incumbents was found to involve the use of race.

(continued...)

Under *Shaw v. Reno*, a necessary threshold for strict scrutiny is a district shape "on its face . . . 'unexplainable on grounds other than race.'" 125 L.Ed 2d at 527 (citation omitted). Where regularly shaped, compact versions of minority districts are possible, the State's choice to recognize minority voting strength in a less regularly shaped manner cannot be attributed to a racial motive or to a desire to segregate on the basis of race. Both the regular and the irregular district equally meet the State's goal of complying with the Voting Rights Act; the irregular version meets several other State goals, concerning, for example, incumbents, constituent desires, businesses and airports. Where a regularly shaped version of a voting rights district is rejected for reasons such as these, the analysis should never reach strict scrutiny.

The district court's interpretation of narrow tailoring conflicts with the decisions of the Southern District of Georgia and the Eastern District of North Carolina. *Johnson v. Miller* reasoned that incorporating notions of compactness, contiguity or respect for political subdivisions into the definition of narrow tailoring would

> elevate to constitutional status that which was intended only as a barometer for determining whether a district adequately serves its constituents. Observance of those traditional principles is also difficult to judge at the exacting level required for a narrow tailoring determination, and such judging would force the judiciary to meddle with legislative prerogatives to an undesirable degree.

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[34](...continued)
State App. 65a. Thus, the minority districts were held unconstitutional because of the influence on their shapes of a *constitutional* use of race in the white districts. This result does not appear to have been contemplated by the Court in *Shaw v. Reno*.

Slip op. at 19 n.40. *See also Shaw v. Hunt*, No. 92-202-CIV-5-BR (E.D. N.C. Aug. 1, 1994), slip op. at 95. The court below commented: "Regarding this aspect of narrow tailoring, we ... register disagreement with the two-judge majority that decided *Shaw* on remand." State App. 72a n.55.

The extension of *Shaw v. Reno* to require that all minority opportunity districts maximize regularity of shape has troubling implications. It gives district shape exclusive influence, exalting judges' aesthetic and civic ideals over the careful balancing of the State's interests, performed by elected representatives. This seriously undermines the principle of federalism. Redistricting is "fundamentally a political affair," *Davis v. Bandemer*, 478 U.S. 109, 145 (1986) (O'Connor, J., concurring), on which the federal judiciary should "follow the policies and preferences of the State, as expressed . . . by the State legislature," *White v. Weiser*, 412 U.S. 788, 795 (1973).[35]

The lower court's conclusion also means that a State has less flexibility when it acts *voluntarily* than when it waits to be sued under section 2. After finding a violation, the federal court must give the State an opportunity to devise a remedy according to the legislature's definition of "important state interests," which may include protecting incumbents, *White v. Weiser*, 412 U.S. at 796. *See Growe*, 113 S.Ct. at 1081 (voluntary compliance encouraged); *Chapman v. Meier*, 420 U.S. 1, 27 (1975).

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[35]The Court recently emphasized that "[r]eapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court." *Growe v. Emison*, 113 S.Ct. at 1081 (internal quotations omitted). *See also Voinovich v. Quilter*, 113 S.Ct. at 1157; *Reynolds v. Sims*, 377 U.S. 583, 586 (1964).

Even more troubling is that by imposing a special regular-shape maximization requirement *only* on minority opportunity districts, the court below mandates that the State discriminate *against* racial minorities, compared to other groups seeking recognition of their voting strength. Redistricting involves "competing claims of political, religious, ethnic, *racial*, occupational, and socioeconomic groups." *Bandemer*, 478 U.S. at 147 (O'Connor, J., concurring) (emphasis added). Under the rule established by the court below, a state may, without federal court interference, construct *irregular* districts to recognize the voting strength of any group that is not a historically disadvantaged racial minority -- even on the basis of normally suspect classifications, such as partisan affiliation[36] or religion. Yet, racial minorities must convince the State to forsake all other districting goals and to maximize the regular shape of minority opportunity districts.[37] This

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[36]*See Bandemer*, 478 U.S. at 143 (plurality opinion) (partisan vote dilution occurs only when electoral system consistently degrades voters' influence on system as a whole).

[37]The ruling below also requires the State to discriminate against minority incumbents and would-be incumbents. Craig Washington, an African American incumbent in 1991, was treated like all other, mostly white incumbents, when the Legislature created a district from which he could be re-elected. Because racially polarized voting is a fact of life in Texas, race had to be taken into account in constructing District 18, just as Republican districts had to be majority white. To achieve other important state interests, Washington's district became irregular, just as the districts of white incumbents in Harris County. By singling out one incumbent on the basis of race and forcing the State to treat him less favorably than all other incumbents, the district court requires unconstitutional racial discrimination against the State's only African American incumbent.

Similarly, although Districts 29 and 30 had no incumbent, two State Senators, one white and one African American, were treated as

(continued...)

heaps an additional, overwhelming disadvantage on racial minority groups which already suffer tremendous obstacles in the political process -- obstacles which the Equal Protection Clause and the Voting Rights Act were intended to ameliorate, not intensify.[38]

II. THE COURT BELOW ERRED IN IGNORING THE HIGHLY IRREGULAR SHAPES OF TEXAS' MAJORITY-WHITE DISTRICTS

This case raises the important, unresolved question whether the highly irregular shape of virtually all of a state's congressional districts should be considered in evaluating minority opportunity districts. The court below found three minority opportunity districts unconstitutional, while specifically upholding the constitutionality of 18 irregularly shaped, majority-white districts. As found by the lower court, many Texas majority-white districts are "disfigured" and "equally 'untraditional.'" State App. 9a, 65a. Yet, the court subjected only minority opportunity districts to strict scrutiny.

Under *Shaw v. Reno*, "bizarreness," and whether it is explainable on non-racial grounds, has become a doctrinal standard of profound constitutional significance, implicating whether strict scrutiny is applied to a congressional district. Yet, the term "bizarre" has no generally-accepted definition

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[37](...continued)
functional incumbents in the Texas tradition. The court below erred in ruling that *Shaw v. Reno* requires the State to treat these aspirants differently than other incumbents, based on their race, or that of their constituents.

[38]"Singling out the political processes affecting racial issues for uniquely disadvantageous treatment" violates Equal Protection. *Washington v. Seattle School District No. 1*, 458 U.S. 457, 486 n.30 (1982).

in practice or political science literature.[39] In rating the "bizarreness" of districts, one of the plaintiffs in this case explained: "There is no right or wrong on that. That's personal judgment." TR I:41. The court below used the "eyeball"[40] test to find Districts 18, 29 and 30 "bizarre," looking at these districts in isolation from the rest of the State's plan. Clarification of the substantive content of the "bizarreness" doctrine is essential to provide for uniformity of application and to avoid the imposition of widely-divergent, subjective "personal judgment[s]" and "eyeball" tests by plaintiffs and federal courts.

In failing to consider the shapes of other Texas congressional districts, the court below diverged substantially from *Shaw v. Reno*. *Shaw* indicates that the "bizarreness" of a challenged district must be apparent "on its face." 125 L.Ed.2d at 525, 526, 527, 528, 530, 532, 536. The purpose of the bizarreness doctrine is not to impose a fixed, federally-mandated artistic ideal for district shape, but rather to ferret out "unusually-shaped"[41] districts. Where *all* of the State's districts are irregularly shaped, there is nothing "unusual" or "dramatic" about such a shape in a minority opportunity district. Moreover, a facial, non-racial explanation for the irregular shape of the minority districts is obvious -- they are shaped just like the rest of the State's districts.

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[39]Similarly, as recently explained by the court in *Johnson v. Miller*: "there is no litmus test for compactness; it has been described as 'such a hazy and ill-defined concept that it seems impossible to apply it in any rigorous sense in matters of law.'" Slip op. at 80. *See also Shaw v. Hunt*, slip op. at 90-92 (no judicially manageable standard of compactness).

[40]*E.g.* State App. 46a.

[41]*Shaw*, 125 L.Ed.2d at 521. *See also id.* at 529 ("dramatically irregular shapes").

If the court below had correctly applied the bizarreness doctrine, districts 18, 29 and 30 would not have been subjected to strict scrutiny. The irregular shape of many majority-white congressional districts is beyond dispute. The plaintiffs identified 23 of Texas' current congressional districts as equally or more bizarre than districts 18, 29 or 30.[42] Only four of Texas' 30 districts did not appear on a plaintiff's list as at least equally bizarre to district 18, 29 or 30. On these facts, it is illogical to conclude that the shape of a minority opportunity district "on its face" establishes a racial basis, while the equally irregular shapes of other districts do not.

III. THE COURT BELOW ERRED IN IGNORING THE SIZE, FUNCTIONALITY AND RATIONALITY OF DISTRICTS 18, 29 AND 30

This case also presents the important question left unresolved in *Shaw v. Reno* concerning whether small, urban, functional congressional districts are "bizarre" and unexplainable on grounds other than race. In *Shaw v. Reno*, the Court emphasized that one of the districts before it spanned 160 miles, ten counties and several urban areas. Unlike the districts at issue in *Shaw*, Districts 18, 29 and 30 are each in a single media market and served by a single transportation system. District 30 rationally joins together persons who have a common interest in the DART transportation system. The Court should note probable jurisdiction to decide whether the functionality[43] and

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[42]Thomas Dep. 49-52; Vera Dep. 36-44; Blum Dep. 65-73; Chen Dep. 65-77; Powers Dep. 55-58.

[43]*See De Witt v. Wilson*, 1994 WL 325415, pp. 5-6 (E.D. Calif. June 27, 1994) ("[c]ompactness does not refer to geometric shapes but to the ability of citizens to relate to each other and their representatives and to the ability of representatives to relate effectively to their

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rationality of urban districts should be considered in assessing their constitutionality.

IV. THE COURT BELOW ERRED IN HOLDING THAT PLAINTIFFS PROVED AN EQUAL PROTECTION VIOLATION

Although *Shaw v. Reno* has primarily been viewed as a ruling about the shape of congressional districts, the decision also sets out the substantive elements of this type of claim. Under *Shaw,* the substantive elements a plaintiff must prove are:

1. the district includes individuals who belong to the same race, but who are otherwise widely separated;

2. the district is segregated;

3. the district reinforces stereotypes that members of a racial group will prefer the same candidates at the polls;

4. the district exacerbates racially polarized voting; and

5. the district results in elected officials who do not represent their constituency as a whole.

125 L. Ed. 2d at 525, 529-530. In the instant case, plaintiffs proved none of these substantive elements of a "racial gerrymander." Although it was not their burden, defendants and intervenors *disproved* each of these elements. The

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[43](...continued)
constituency"); *Johnson v. Miller*, slip op. 83, n.43 (prefers "functional" approach to compactness); *Shaw v. Hunt*, slip op. 132-138.

Court should note probable jurisdiction to clarify that an Equal Protection claim under *Shaw v. Reno* is not simply about artistic ideals of shape, but includes important substantive elements on which plaintiffs have the burden of proof.

V. THE COURT BELOW ERRED IN HOLDING THAT THE PLAINTIFFS HAVE STANDING

Standing to assert a constitutional claim normally requires proof of a "concrete and particularized" injury. *Lujan v. Defenders of Wildlife*, 119 L. Ed. 2d 351, 364 (1992) (citations omitted). The Court below interpreted *Shaw v. Reno* as discarding normal standing doctrine and as conferring *automatic* standing on any voter in the state who desires to challenge any or all of a state's voting districts. State App. 50a, n.38. The Court should note probable jurisdiction to clarify that the same standing requirements apply to *white* plaintiffs challenging racial discrimination as to minority plaintiffs.[44]

Shaw v. Reno identified two types of injury that could, if proved, establish standing: 1) a voting rights district causes the representative to "represent a particular racial group rather than their constituency as a whole"; or 2) a district "reinforces racial stereotypes." 125 L. Ed. 2d at 530. Plaintiffs proved neither of these injuries, but instead showed the following:

District 18: Plaintiff Thomas has been "very favorably impressed" with congressional nominee Sheila

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[44]*See Allen v. Wright*, 468 U.S. 737 (1984) (stigmatic injury when government discriminates against racial minority group is insufficient harm to confer standing).

Jackson Lee[45] and expects that she will be a good congressional representative. Thomas Dep. 74. Sheila Jackson Lee does not ignore white voters and Thomas expects as a Congresswoman, Sheila Jackson Lee will reach out to white voters and try to build racial bridges. *Id.* at 78.

District 29: Plaintiff Thomas felt that Congressman Green did not represent her only because he is a Democrat and she is a Republican. Thomas Dep. at 47.

District 30: Plaintiff Orcutt stated that Congresswoman Johnson does not represent her because Orcutt has a conservative philosophy, but the complaints are *unrelated to race*. Orcutt Dep. at 20-24, 26.

Strong, uncontradicted evidence shows that the congressional representatives of Districts 18, 29, and 30 effectively represent their constituents, regardless of race or ethnicity.[46] The only evidence on racial stereotypes shows that minority opportunity districts help break down, rather than reinforce these notions, by giving highly-qualified

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[45]This past March, Councilwoman Sheila Jackson Lee defeated incumbent Congressman Craig Washington in the Democratic primary for nomination as the representative of District 18.

[46]*See, e.g.*, Lawson Ex. 7 ¶ 11; Lawson Ex. 9 ¶ 11; Lawson Ex. 10 ¶¶ 4, 9 (white voter in CD18); Lawson Ex. 12 ¶¶ 5, 7; Lawson Ex. 13 ¶ 3; Lawson Ex. 21 ¶¶ 9, 11, 16 (white voter in Dallas County); Lawson Ex. 22 ¶¶ 4, 6-7, 9 (white voter in CD30); Lawson Ex. 23, ¶¶ 10-14; Lawson Ex. 25 ¶¶ 7, 8, 9, 12 (white voter in CD30).

minority representatives, such as Barbara Jordan, exposure in the white community.[47]

Plaintiffs' claimed injury is the belief in "colorblind" districting. TR I:23 (Blum); *id.* at 29 (Chen); Thomas Dep. 69-70; Powers Dep. 48. Their disagreement with the 1991 redistricting plan falls far short of a "concrete and particularized" injury in fact.

CONCLUSION

For the reasons stated, the Court should note probable jurisdiction.

Respectfully submitted,

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[47]Lawson Ex. 7 ¶ 6 ("Barbara Jordan's . . . strong example made it easier for other African-American elected officials to gain some level of acceptance in the white community.").

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